Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers	)	
to Infrastructure Investment	)	

To: The Commission

COMMENTS OF THE NAVAJO NATION AND THE NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION (NNTRC)

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SUMMARY

The National Programmatic Agreement (NPA), entered into over a decade ago, represents a thoughtful implementation of the FCC's obligations under Section 106 of the National Historic Preservation Act (NHPA), and fully considered the trust responsibility the Commission has with regards to Native Nations. The FCC went to great lengths in engaging Tribes in government-to-government consultations before adopting the NPA.

Now, in the name of "progress," carriers seek to destroy the essence of the NHPA, which was to ensure that the Federal government "use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." Carriers claim that the Section 106 "rarely" results in incursions upon culturally sensitive areas, is too time consuming, and too costly.

The present *NPRM* is a "regulatory action" and its issuance without prior Tribal consultation constitutes a violation of the FCC's trust responsibilities to Tribes. It is patently unfair to listen to the complaints of carriers who have for generations trampled the sovereign rights of Tribes and then issue an NPRM which clearly puts Tribes on the defensive to demonstrate why the time and cost involved in complying with Section 106 is justified. These Comments, and the other comments that are coming from Indian Country demonstrate why the FCC can't just ignore the law. Even major carriers admit that without the NPA, there is an incentive to ignore the rights of Tribes ***and even an incentive to not report disturbances of Tribal burial grounds***.

Neither should Tribes be forced to shoulder the economic burden of protecting their sacred sites from encroachment by companies wishing to profit from use of these sites. The NHPA talks in terms of the need to provide "financial assistance" to Tribes in carrying out Section 106, and assistance should come from the entities seeking to gain financially from locating telecommunications infrastructure in areas that might implicate culturally sensitive areas.

Any changes to the NPA must be undertaken with proper deliberation and with a full understanding that carriers who have virtually no understanding or appreciation of the history of the First Americans cannot be trusted to self-certify that they are in compliance with Section 106. That responsibility, by statute, falls on the FCC, and cannot be delegated to private parties.

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The Navajo Nation and the Navajo Nation Telecommunications Regulatory Commission ("NNTRC"), through undersigned counsel, and pursuant to Sections 1.415 and 1.419 of the Commission's rules (47 C.F.R. §§ 1.415 & 1.419) submits these Comments in the above-referenced proceeding in response to the Commission Notice of Proposed Rulemaking, FCC 17-38, released April 21, 2017 and published in the Federal Register on May 10, 2017 (the "*Accelerating Deployment NPRM*" or "*NPRM*").[1] These Reply Comments focus on the paragraphs of the *NPRM* suggesting that the Commission's Section 106 process which acts to protect Tribal sovereignty and protect areas of religious or cultural importance to Native American Tribes should be amended. In support of these Comments, NNTRC submits:

I. BACKGROUND

The Navajo Nation consists of 17 million acres (26,111 square miles) in portions of three states—Arizona, New Mexico, and Utah. The Nation is comparable in size to West Virginia. Were it a state, the Navajo Nation would rank 4th smallest in population density; only Montana

[1] 82 FR 21761 (May 10, 2017). The date for filing comments was set as June 9, 2017. *Order*, DA 17-525, released May 26, 2017, the Commission extended the comment date to June 15, 2017, and these Comments are therefore timely filed.

(6.5 persons per square mile), Wyoming (5.4) and Alaska (1.2) are less densely populated.[2] For Section 106 purposes, the Nation tracks all of its aboriginal lands, which extend anywhere from 10 to 100 miles beyond the federally recognized borders of the Navajo reservation in all directions, such area containing numerous sacred sites.[3] The Navajo Nation Heritage and Historic Preservation Department (NNHHPD) has a staff of 22, and NNHHPD employs only 3 staff to conduct Section 106 reviews. NNHHPD itself does not charge for Section 106 reviews, but the Nation charges a permit fee for archaeological consultants to come onto Navajo lands based on a sliding scale from $50.00 to $1,650.00 depending on proposed project size.

The NNTRC was established pursuant to Navajo Nation Council Resolution ACMA-36-84 in order to regulate all matters related to telecommunications on the Navajo Nation. Telecommunications is defined broadly under the Navajo Nation Code to include broadband and "any transmission, emission or reception (with retransmission or dissemination) of signs, signals, writings, images, and sounds of intelligence of any nature by wire, radio, light, electricity or other electromagnetic spectrum."[4] Its purpose is to service, develop regulation and to exercise the Navajo Nation's inherent governmental authority over its internal affairs as authorized by the Navajo Nation Council and the Navajo Telecommunications Regulatory Act.[5]

NNTRC is specifically authorized, pursuant to the Navajo Telecommunications Regulatory Act, to act as the intermediary agency between the Navajo Nation and the Federal Communications Commission, including representing the Navajo Nation in proceedings before

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[2] *Compare* *http://en.wikipedia.org/wiki/List_of_U.S._states_by_area* (states ranked by geographic area) *with* http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density (states ranked by population density).

[3] *See* Attachment 1, map of the aboriginal boundary of Navajo Indian Reservation.

[4] 21 N.N.C. § 503 (V).

[5] Codified at 2 N.N.C. §§ 3451 -55; 21 N.N.C. §§ 501-529.

the Commission, intervening on behalf of the Navajo Nation on matters pending before the Commission, and filing comments in rule making proceedings.

II. DISCUSSION

These Comments are directed at those portions of the *Accelerating Deployment NPRM* that seek input on whether the FCC's rules established to implement the National Historic Preservation Act (NHPA) of 1966 should be changed to lessen the alleged burden on carriers as they roll out new 5G services. To put it bluntly, under the guise of "streamlining," carriers seek to avoid their responsibilities under both statute and FCC rules.

A. The FCC's After-The-Fact Tribal Consultation Violates its Trust Responsibilities

The *NPRM* appears to be a classic case of "Ready, Fire, Aim." The *NPRM* is replete with "evidence" put forth by carriers who claim that the current Section 106 process is costly, burdensome, and slows deployment of new technologies.[6] Yet the *NPRM* is almost devoid of any input from Tribes other than reference to the Nationwide Programmatic Agreement (NPA),[7] and the United South and Eastern Tribes (USET) Voluntary Best Practices document, which the FCC developed in conjunction with Tribes over a decade ago.[8] The *NPRM* instantly puts Tribes on the defensive – requiring them to prove why the Section 106 process should not be modified or scrapped, without any formal consultation with Tribes.

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[6] *See, e.g., NPRM* ¶ 34 ("The historic preservation review process under Section 106 of the NHPA has raised particular concerns among wireless providers. This process not only requires that providers make their own determinations as to whether a project will have effects on historic properties, but also requires obtaining input from SHPOs and Tribal Nations, and wireless providers argue that this process results in significant delays in the execution of their deployment plans," citing comments filed by multiple carriers and carrier associations).

[7] *See* 47 C.F.R. Part 1, App. C, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process § II.A.1 (NPA).

[8] *See NPRM*, n. 111.

This violates the FCC's trust relationship with Tribes wherein the FCC promised to consult with Tribes ***prior*** to taking a ***regulatory action***.[9] The issuance of an NPRM is a regulatory action,[10] and the tenor of the *Accelerating Deployment NPRM*, with its heavy reliance on industry "evidence," show exactly why ***prior*** consultation is required, and vital to protect the sovereign interests of Tribes. It is patently unfair for the FCC to listen only to the business interests of carriers and issue the instant *NPRM*. Nor did the recent consultation conference call (in reality merely a "listening session") do anything to cure this fundamental breach of the FCC's responsibility. On that call, it was made clear to Tribes that the burden was on them to defend the current rules in formal comments.

The Navajo Nation therefore calls on the FCC to halt the current proceeding until meaningful Tribal consultation is conducted and a new *NPRM* is issued that takes the input of Tribes into account, rather than just the input of wireless carriers. The FCC must unstack the deck dealt by the *NPRM* and approach any potential revisions to the Section 106 process in a fair manner that lives up to the Commission's trust responsibilities.[11]

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[9] *See, Statement of Policy on Establishing Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd. 4078 (2000) ("The Commission, in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources").

[10] *See* Executive Order 12866, § 3(e), published September 30, 1993 ("'Regulatory action' means any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking").

[11] The *NPRM* at paragraphs 56-59 seeks comment on whether the FCC should continue to facilitate meetings between industry and Tribes. If the Commission continues to conduct this proceeding as it has with an "industry first," approach, it may find Tribes far less willing to meet and talk candidly about these issues, where those discussions can be turned around and used by industry to advance their own economic interests. Trust is built slowly in Indian Country, and can vanish in an instant if a Tribe believes that a Federal agency is no longer acting in an impartial manner. *See* discussion below in Section E. concerning Twilight Towers and towers without leases on Tribal lands. The quote from the AHCP is extremely troubling: "if an agency or applicant attempts to consult with an Indian Tribe and the Tribe demands payment, the agency or applicant may refuse and move forward." This tramples upon tribal

B. The Section 106 Process is Vital to Protecting Culturally Sensitive Areas to Tribes

In their desire to reduce their costs and allegedly speed deployment of next generation wireless services (4G and 5G), carriers point to supposed abuses of the Section 106 process to argue that their needs should take precedence over the statute and the rights of Tribes to protect their religious and culturally sensitive areas.[12] Carriers claim that the Section 106 process rarely results in the need to change sites or otherwise protect Tribal areas, especially when it comes to deploying small cell technology.[13] Yet even Verizon must admit that the Section 106 process ***does result*** in findings of adverse effect on Tribal lands.[14] 29 instances of adverse findings are not insignificant to each of those affected Tribes. If even one example of an adverse effect can be found through the Section 106 process, this proves that the current system works and the FCC must move slowly and carefully in changing the process.

For the Navajo Nation, the Section 106 process has produced many instances where carriers have sought to build in religious and culturally sensitive areas. The Navajo Nation

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sovereignty and allows one federal agency to dictate Tribal policy—effectively forcing a Tribe to accept an outsider to come in and destroy cultural resources. While federal rules are important, because Tribes have, in fact, more sovereign status than states, Tribes and states ***must*** be treated equally in this and any proceeding.

[12] *See, e.g. NPRM*, ¶¶ 32-40.

[13] *See, e.g.*, earlier comments in this proceeding, including Comments of CTIA at p. 5 ("Given that wireless facilities deployment in many cases – particularly with regard to small cells – poses no risk to tribal interests, the current breadth of tribal reviews, the delays that are endemic to those reviews, and the substantial fees that providers find they must pay to secure approvals, all pose unnecessary barriers to network deployment nationwide"); Comments of Mobilitie, pp. 3-4 ("there is no basis for tribes to seek reviews or to request fees for small cells, because when these facilities are installed in an active right of way they rarely if ever could affect tribal interests"); Comments of Sprint, p. 44 ("the good intentions to protect important sites have led to spiraling costs at sites with no chance of having an adverse impact on a site that meets the criteria under the FCC's Nationwide Programmatic Agreement of eligibility for inclusion on the National Register of Historic Places").

[14] Comments of Verizon in WT Docket 16-421, p. 36 ("Of 8,100 requests for tribal review submitted between 2012 and 2015, only 29 (.3 percent) resulted in findings of an adverse effect to tribal historic properties, and there were no adverse effects from projects with no new ground disturbance").

provides the following four examples since TCNS was put into place where the process has resulted in the saving of culturally sensitive areas:

1) For a number of years a controversy waged over a tower on a sacred mountain within the Navajo Nation that was built by the National Park Service without Navajo government consultation or approval. A major telecommunications carrier somehow obtained the rights to the tower and sought to upgrade it to provide cellular service into Page, Arizona. Through the Section 106 process, the Navajo Nation, although it was not able to get the tower removed, at least was able to convince the carrier to also provide service from that tower into Navajo lands. Without the leverage provided in the Section 106 process, the carrier no doubt would have ignored service in Navajo lands. The example underscores the importance of the Section 106 process as one of the very few "seats at the table" when it comes to the Federal government allowing non-Tribal actors to conduct business on Native lands in the name of "commerce." Without the Section 106 process, no doubt the carrier would have moved forward with using a sacred site to make a profit while refusing to provide any benefit at all to the Tribe upon whose land the tower sits.

2) Another wireless carrier identified a location for a new tower. Although the site was not an official Traditional Cultural Place (TCP), further inquiry of the nearby residents indicated that their oral history indicated that the sites were of significance. The Navajo Nation worked positively with the carrier to identify nearby sites that were still suitable but were outside of any culturally sensitive areas.

3) In another instance a TCNS filing indicated that a carrier wished to place a new tower in the middle of a TCP. Again, the Nation and the carrier worked together proactively to locate another nearby site for tower construction.

4) Finally, in another instance, a carrier wished to build a tower directly adjacent to a Tribal ceremonial gathering place. That tower also was eventually built at another location.

The current system, although far from perfect, does work, and more importantly, serves the function required by the NPA. Absent far more than just the anecdotal evidence that has been thus far presented in the record, there is no valid reason to scuttle a process that in many ways is the envy of other federal agencies in their dealings with Tribes.

C. The Economic Burden For Section 106 Compliance Should Not be Borne by Tribes

Carriers also complain about the cost of the Section 106 process and interfacing with Tribal Historic Preservation Officers (THPOs), especially fees charged by Tribes.[15] While the *NPRM* correctly notes that: "Neither the NHPA nor the ACHP's implementing regulations address whether and under what circumstances Tribal Nations and NHOs may seek compensation in connection with their participation in the Section 106 process,"[16] the NHPA acknowledges that there are costs involved for Tribes to participate in the Section 106 process, and that "financial assistance" may be required.[17] The *NPRM* references an ACHP 2001 memorandum and a "handbook last issued in 2012" for the proposition that applicants for FCC licenses need not reimburse Tribes for the effort necessary to respond to a TCNS notification unless the Tribes "fulfills the role of a consultant or contractor."[18] Yet the ACHP's own website states: "If a Federal agency has the authority to impose the development of such information and analyses on the applicant and chooses to do so, the ***legal basis for that obligation on the applicant lies in the Federal agency's authorities and does not derive from ACHP's regulations***."[19] In other words, while the FCC seeks to defer to ACHP's "guidance" on fees, ACHP itself does not claim the authority to impose its interpretation of when fees are called for. The FCC is neither required to follow ACHP's guidance, nor can it simply defer to that guidance in this instance.

The Commission therefore must consider this issue from the perspective of the rights of Tribes vis-à-vis the desire of carriers to receive the economic benefit conveyed by an FCC

[15] *NPRM*, ¶ 34-38.

[16] *NPRM*, ¶ 43.

[17] 16 U.S.C. § 470a(d)(4)(A).

[18] *Id.*

[19] Emphasis added. http://www.achp.gov/regs-fees.html (last visited May 31, 2017).

license. While a carrier gets to profit from a new tower being built, it is the Tribe that must appoint a THPO and pay the salaries and expenses related to that office. As noted above, the Navajo Nation is the size of the state of West Virginia. Given that it is the carriers who seek access to our lands and adjacent aboriginal lands to build their infrastructure, the economic burden of disrupting Navajo culture and our way of life in order to allow a carrier to "provide services to the people," or more accurately, for the carrier to profit from the customers living and working within the Nation, should not fall on the Navajo people.[20] If carriers were contributing facilities to the Navajo Nation, or sharing revenues with the Nation, that would be a different situation. But merely claiming that the services they offer (and profit from) will benefit the Navajo people is not enough to shift that economic burden onto the Navajo government. Carriers should be required to compensate Tribes for the cost of reviewing requests to place infrastructure on Tribal lands or which may impact sensitive areas, and that simply can't be done for less than $200 as PTA-FLA seeks.[21] To the extent that there are Tribes that do seek to "profit" from the Section 106 process, carriers have the right to file a grievance with the FCC against that particular Tribe. A few instances of Tribal overreach provide no basis to change a process that has served both Tribes and carriers well for over a decade.

D. Other Issues Raised in the *NPRM*

In terms of changes that can be made to the Section 106 process to speed deployment of broadband into Indian Country (other than fees, which are discussed in Section C above), the Navajo Nation and NNTRC address the following proposals in the *NPRM*:

[20] As noted in the introduction, currently the Navajo Nation does not charge for Section 106 reviews. It does require any archeological consultant coming onto Navajo lands to obtain a permit, with fees ranging $50 to $1,650, depending on the size of the project. If, as the FCC predicts, the Navajo Nation may be flooded with new Section 106 review requests, the Nation reserves the right to revisit its current policies, and if it deems necessary, begin charging for Section 106 reviews.

[21] *NPRM* ¶ 38.

1) While the FCC can work through proper Tribal consultation to develop a model fee schedule, the needs of individual Tribes vary considerably. It is far more expensive and labor intensive for the Navajo Nation to oversee 17 million acres (plus many more acres that make up its aboriginal lands) than for a Tribe that has a small land area. Tribes must be free to implement fees that meet their unique circumstances, subject to a complaint filed with the FCC by a carrier.[22]

2) NNTRC agrees that areas of interest can be delineated by counties rather than by full states.[23]

3) NNTRC does not understand what type of Tribal "certification" the Commission is seeking in paragraph 53. The logging of an area of interest within TCNS is itself a certification that a Tribe has a legitimate interest in the area. Is "certification" nothing more than a code word to allow the FCC or carriers to challenge areas of interest? Does the FCC intend to put Tribes on the defensive on this issue too?

4) NNTRC objects to the proposal in paragraph 54 for the FCC to retain information as to culturally sensitive sites.[24] The TCNS system is predicated on the notion that Tribally sensitive areas are to be protected and to remain confidential. Posting "keep out" areas would shine a spotlight on those areas that are to remain hidden from the prying eyes (and poacher shovels). The Nation is currently working on developing areas that would be "all clear" for development. These areas are typically going to be in higher traffic zones with significant existing construction and ground disturbance; new construction in remote areas will always be a cause for concern. The limitation on these locations is that the entirety of the site would need to be constructed within the cleared zone, and any travel and extraneous movement that needs to be done must be done on already existing roads.

5) NNTRC does not believe that one Tribe could do a Section 106 clearance on behalf of another Tribe.[25] Each of the 567 federally recognized Tribes has its own history and own unique areas that are culturally sensitive and need to remain confidential. Because of this, Tribes cannot be forced to share this sensitive information with any third party, including another Tribe. While this makes the Section 106 process more cumbersome for areas where multiple Tribes have designated the area of interest, this is necessary in order to protect the confidential information of each Tribe.

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[22] *NPRM*, ¶ 52.

[23] *NPRM*, ¶ 53.

[24] *NPRM*, ¶ 54.

[25] *NPRM*, ¶ 55.

6) Allowing self-certification by applicants[26] will return Tribes to the days where carriers could run roughshod over the rights of Tribes. There remain carriers who refuse to recognize the sovereignty of Tribes or the rights to exclude others under *Montana v. United States*.[27] The Navajo Nation and NNTRC also question whether the FCC can delegate its responsibilities under the NHPA to commercial entities. Overall, this is one of the worst ideas put forth in the *NPRM*. Historic and cultural sites are the most precious resources to the Tribes. Tribes cannot and will not share such information with any outside entity, organization or person in order to keep some of the few remaining important places away from the general population's view and thieving or destructive hands. The PTA-FLA petition says it all. In arguing that an insurance regime should replace the Section 106 review process, PTA-FLA states:

> "This would ensure at relatively small cost that tower constructors would not violate the integrity of previously unknown Indian sites. The crews working on such a site and the people they work for would then be incentivized to report any burial ground they came across ***as opposed to the current incentive to not report*** it since the result would be that they would all get paid the same but not have to complete the work."[28]

In other words, left to their own devices, carriers, tower companies and construction companies would rather ignore a sacred site disturbance than risk having to stop construction to remediate the damage. How could the Commission possibly entertain the thought of a self-certification process when this is the publicly professed mindset of the industry?

7) The *NPRM* asks if there are additional ways to streamline the Section 106 process and whether "batch" processing of TCNS notices could be implemented.[29] The Navajo Nation does not believe that a "one size fits all" approach to handling multiple Section 106 notifications will work. For instance, could a carrier "batch" together in a single notification many sites spread throughout the 17 million acres of the Navajo Nation? The Navajo Nation is concerned that "batching" could be abused by carriers who could attempt to overwhelm the resources of Tribes by submitting such a high number of requests in a single TCNS notification that there is no way that the

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[26] *NPRM*, ¶ 61.

[27] 450 U.S. 544, 565 (1981). A review of the comments filed by carriers in response to Navajo Docket NNTRC-11-001 shows that a number of carriers have no respect for the rights or sovereignty of the Navajo Nation. *See* http://www.nntrc.org/Comments_Received.aspx. If carriers are not even willing to recognize the basic sovereign rights of Tribes, how can they be counted on to seriously undertake their obligations under Section 106 and truthfully certify to the FCC that they has taken all necessary steps to comply with Section 106? That was certainly not the case prior to the adoption of the NHPA.

[28] PTA-FLA Petition, filed May 3, 2016, p. 16 (emphasis added).

[29] *NPRM*, ¶¶ 62-63.

Tribe could timely respond. Worst yet, batching could be used to hide an extremely problematic site in amongst hundreds of "routine" notifications, leaving it up to the "eagle eye" of a THPO to spot the one request that raises significant issues.

8) The Navajo Nation NNTRC objects to the reduction of the historic district buffer from 250 feet to 50 feet.[30] This concept may work in the context of urban areas, but makes less sense in highly rural areas such as the Navajo Nation where the majestic vistas are so important to our culture. Any historic building or area needs its own review. There is no way to get around this. Each Tribe's standards for what they consider a historic property, should, again, be left up to each Tribe to determine. It is not fair to require Tribes to install modern technology on their historic properties without going through proper review to ensure it is a compatible use.

9) The PTA-FLA Petition argues that Section 106 Review should not apply to any tower not directly tied to a site-specific license.[31] PTA-FLA's tortured reading of *CTIA v. FCC*[32] should not provide the basis for the FCC to reverse itself and the conclusion that it retains a limited approval authority over facility construction, no matter the specifics of the license.[33] From a historic preservation perspective, the potential environmental impact is the same whether the construction was authorized at a specific site or within a geographic region authorized in a license. The FCC was correct to conclude that its obligations to comply with Section 106 attach to all types of constructions. An opposite reading would allow any federal agency to dispense with Section 106 merely by failing to specify construction coordinates in any authorization, something Congress never could have intended when it found that federal agencies must "foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony."[34]

10) The Commission also seeks comment on how Section 106 should apply to non-licensees, noting the rise of third-party business building and owning towers separate from licensees.[35] The PTA-FLA petition presages what would happen if the FCC allowed such third parties to build towers outside of the Section 106

[30] *NPRM*, ¶ 73.

[31] PTA-FLA Petition, p. 10; *see also NPRM*, ¶ 76 (inviting comment on whether the Commission should "revisit" its interpretation that Section 106 obligations apply to the construction of wireless towers not subject to a site-specific license).

[32] 446 F.3d 105 (D.C. Cir. 2006).

[33] *See Pre-Construction Review Order*, 5 FCC Rcd at 2943, paras. 9-11*; see also CTIA v. FCC*, 446 F.3d at 115 (holding that this interpretation was not arbitrary and capricious).

[34] NHPA¸16 U.S.C. § 470-1(1).

[35] NPRM, ¶ 77.

process: "This relief in itself would eliminate 90% of the problems."[36] In other words, the FCC merely needs to say the word and carriers will offload construction to third parties and the entire Section 106 process (and its concomitant protection of Tribal interests) will be sidestepped. A great victory for carriers, and a total abdication of the FCC's statutory responsibilities under the NHPA.

E. Carriers Must Address the Continuing Problem of "Twilight Towers" and Towers Without Leases

Carriers claim that they need relief from a burdensome Section 106 process in order to bring the next generation of wireless service to all Americans. They claim to be good corporate citizens who are unjustly faced with an overly burdensome regulatory system. They further claim to have the best interests of Tribes at heart, and claim to be protecting the cultural and religious heritage of Tribes. What carriers don't want to talk about, and haven't wanted to talk about for decades, are all the "twilight towers"[37] and towers that have no current leases that exist on Tribal lands. Carriers for generations abused FCC and BIA processes in building infrastructure that crisscrossed Indian Country without seeking proper authority. They have continually stalled in resolving this issue. The FCC appears ready to sweep this tragedy under the rug in the name of "progress."[38]

If carriers want the cooperation of Tribes in relief from some Section 106 burdens, then they have got to come the table willing to take responsibility for their past actions and current

[36] PTA-FLA Petition, p. 13.

[37] "Twilight Towers" are those towers built between March 16, 2001 and March 7, 2005, which were not required to submit to a Section 106 review.

[38] *NPRM*, ¶ 81 (arguing that allowing collocations on towers that have never been through the Section 106 process is somehow preferable to a new tower that must undergo Section 106 review, apparently under the theory that "two wrongs make a right"). The Navajo Nation and NNTRC is particularly concerned with the comments of Commissioner O'Rielly who seemed to place the blame on Tribes for the failure to resolve the Twilight Tower issue and thus allow for collocations on Twilight Towers. *See NPRM*, Statement of Commissioner Michael O'Rielly. Commissioner O'Rielly clearly intimated that he does not want any type of enforcement action or penalties against these towers. His comment is unrealistic and signifies everything that is wrong and has been wrong with the treatment of Native Americans from the beginning of our encroachment on their land in 1492.

lease-less operations before another generation of technology, and people, pass by. Given the way that some carriers have treated Tribes, it is no wonder that many Tribes are skeptical when carriers claim their 4G and 5G deployments don't need Section 106 review. These are the same companies that generations ago claimed that they didn't need Tribal approval to build on Tribal lands, and many of whom refuse to enter into leases with Tribes for towers on Tribal lands.[39]

Further, Section 106 obligations must apply to all who build towers, not just carriers holding FCC licenses.[40] If carries know that there is a "loophole" in Section 106 that allows them to avoid their obligations to respect the sovereign rights of Tribes, they will instantly outsource their towers. It's as simple as that. Similarly allowing non-licensees to collocate on Twilight or Pre-NPA towers without undergoing Section 106 review will provide an incentive for carriers to transfer ownership of these towers to a non-license holder as a way of escaping responsibilities for the "sins of the past." Such an approach does not solve those problems, it merely sweeps them under the rug.

The Commission requested, at paragraph 81, the specific steps that should be taken to resolve Twilight Towers. The Nation suggests collaboration with the individual Tribes on this issue. The Nation would prefer that the following occur: the tower owner come to the Navajo Nation General Land Development Department (GLDD) and admit that there is no lease on the tower in question. The Nation would require the same steps of the Twilight Towers as they require of new tower construction. As stated in our previous comments, the Biological Resources Clearance Form and the Cultural Resources Clearance Form need to be completed, as

[39] The NNTRC, despite significant effort, has been unable to identify all towers on the Navajo Nation. The current FCC Antenna Registration System (ASR) database does not contain any sort of Tribal filter to assist Tribes in identifying registered towers that might be on Tribal lands. Adding such functionality to the ASR database would go a long way in assisting Tribes to identify problematic towers (at least those towers that must be registered).

[40] *NPRM*, ¶ 77.

well as surveys. In assessing past payments that have not been made, the GLDD and NNTRC will engage its attorneys to negotiate. If the Twilight Tower owner does not come forward to the Nation and make us aware of a tower that does not have a lease or undergone proper review, when the Nation does find these towers (which it is in the process of doing), the Nation will initiate trespass action against the tower owner, which may result in higher fees against the tower owner and will possibly result in exclusion from the Nation. This would be a significant problem for a carrier that has other compliant towers on the Nation. The Nation highly encourages carriers to conduct an inventory of all towers on the Nation's land and collaborate with the Nation to resolve this issue in a timely manner. The more time that passes, the more likelihood that the Nation will find the non-compliant towers and begin a trespass action. For those non-compliant towers constructed after 2005, when compliance was required, the Nation suggests the same approach as above; however, a fine by the FCC should be added.

F. Any Changes to the Section 106 and NHPA Process Must Come With Enforceable Promises on the Part of Carriers to Deploy Next Generation Services into Indian Country

At the same time carriers seek extensive relief from the Section 106 process, there is no evidence that those same carriers are poised to begin deploying 4G or 5G service in Indian Country (other than possibly along major roads and highways that bisect reservations). The evidence that delivering telecommunications and broadband services to Indian Country is more costly and more difficult than delivering comparable services to urban areas is compelling.[41]

[41] *See Statement of Policy on Establishing Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd. 4078 ¶ 1 (2000) ("Notwithstanding such efforts to promote ubiquitous service, the Commission has recognized that certain communities, particularly Indian reservations and Tribal lands, remain underserved, with some areas having no service at all"); FCC, *Connecting America: The National Broadband Plan*, at 152 (2010) (*National Broadband Plan*); *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672, para. 1 (2011) (*Native Nations NOI*) ("Native Nations face unique problems in acquiring communications services, particularly broadband high-speed Internet service. Substantial barriers to telecommunications deployment are

Many parts of the Navajo Nation lack 3G service, let alone 4G. The FCC's response to its own admissions has been underwhelming. In the six years since the *USF/ICC Transformation Order* was adopted, a mere $50 million in new money has gone into infrastructure development specifically targeting Indian Country through the Tribal Mobility Fund Phase I reverse auction, and some $30 million of that went to companies serving Alaska. If carriers want Tribes to work with and negotiate a streamlined process under the Section 106 process, then they must be willing to stand up and promise that they will deploy future generations of technology into Indian Country, and not just along major highways and in the most highly populated areas of reservations. An enforceable commitment on the part of carriers to such deployment would go a long way in convincing Tribes to give up some of their rights under Section 106 of the NHPA.

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prevalent throughout Tribal lands. Those barriers include rural, remote, rugged terrain and areas that are not connected to a road system that increase the cost of installing infrastructure, limited financial resources to pay for telecommunications services that deter investment by commercial providers, a shortage of technically trained Native Nation members to plan and implement improvements, and difficulty in obtaining rights-of-way to deploy infrastructure across some Tribal lands. It is thus not surprising that critical infrastructures rarely have come to Tribal lands without significant federal involvement, investment, and regulatory oversight"); *In re Connect America Fund et al*., WC Docket No. 10-90 *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 17820, para. 482 (2011) (*citing Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12208, 12226, para. 32 (2000) ("[v]arious characteristics of Tribal lands may increase the cost of entry and reduce the profitability of providing service, including: (1) The lack of basic infrastructure in many tribal communities; (2) a high concentration of low-income individuals with few business subscribers; (3) cultural and language barriers where carriers serving a tribal community may lack familiarity with the Native language and customs of that community; (4) the process of obtaining access to rights-of-way on tribal lands where tribal authorities control such access; and (5) jurisdictional issues that may arise where there are questions concerning whether a state may assert jurisdiction over the provision of telecommunications services on tribal lands"); U.S. Gen. Accountability Off., GAO-16-222, *Telecommunications: Additional Coordination and Performance Measurements Needed for High-Speed Internet Access Programs on Tribal Lands* at 1 (Feb. 3, 2016) (GAO Report) at 29 ("Access to Internet on tribal lands varies but challenges to access and adoption remain. The high costs of infrastructure buildout on tribal lands, which tend to be remote and rugged terrain, work in tandem with tribal member poverty to create a barrier to high-speed Internet expansion on tribal lands").

G. Federal Indian Law Sets Requirements for Leasing on Indian Lands, Rights-of-Ways, and Environmental and Cultural Reviews; Expedited Reviews at Navajo

Not clearly stated in the *NPRM* is the fact that the National Programmatic Agreement and its amendments do ***not*** apply on Tribal lands.[42] Instead, Federal Indian Law is applicable to such actions through regulations related to Rights-of-Way (ROWs) and tower leases. The BIA determined that telecommunications towers required leases and the Nation has been processing new towers and renewals as leases. 25 CFR §415(e) permits the Navajo Nation to lease tribal lands without needing BIA approval, so long as the Nation's implementing regulations have BIA approval, which has been obtained.[43]

Most companies request access to Rights-of-Ways (ROWs), and here the Nation will provide brief clarification to the carriers to explain their ability to access pre-existing ROWs on Indian Lands. The federal regulations governing ROWs on Indian Lands do not grant liberal, unrestricted access and in fact require quite a cumbersome federal process, which is governed by the BIA and cannot be overridden by another federal agency. In 2016, the Bureau of Indian Affairs finalized amendments to the Rights-of-Way regulations, whereby all ROWs have to be approved by the Bureau of Indian Affairs,[44] and the applicant ***must*** obtain tribal permission.[45]

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[42] At least Verizon acknowledges this in its comments and does not seek to attempt to alter Federal Indian Law through this proceeding. *See* Comments of Verizon, n94 ("This process does not apply to projects located on tribal lands or projects that fall within an existing exclusion from historic preservation review. Projects on tribal lands are reviewed only by the tribe on whose land the project will be located, so there is no need to notify other tribes through TCNS. Verizon is not seeking any changes to the process for reviewing projects on tribal lands"). Yet Verizon is not completely accurate here either, in that multiple Tribes may have a historic preservation interest in areas that are located on another Tribe's reservation.

[43] See 25 C.F.R. §415(e)(1). On May 16, 2014, the Assistant Secretary of the Bureau of Indian Affairs approved the Navajo Nation General Leasing Regulations of 2013, found at 16 N.N.C. §2301 et seq. In order to lease lands without BIA approval, the Nation needed to develop specifications in the tribal code to the satisfaction of the Secretary.

[44] 25 C.F.R. §169.101(a).

[45] 25 C.F.R. §169.107 (emphasis added). These requirements are not new.

An existing ROW may be utilized for telecommunication purposes only under certain conditions—if the preexisting ROW includes in its purpose telecommunications, an amendment would need to be obtained to add the new tenant. If a carrier wishes to co-locate on another structure within a ROW of another grantee, if the stated purpose does not include telecommunication equipment, the company must apply for a new ROW.[46] In the comment and response document, published in November 18, 2015, the federal response is very clear that "compatible uses" as used in other ROW documents is not applicable on Indian lands.[47]

Although leasing on Navajo Nation lands is no longer considered a major federal action requiring BIA approval, the Navajo Nation General Leasing Regulations require the Nation to have two reviews: a biological review and a cultural review. These are one-page forms (called Biological Resources Compliance Form and Cultural Resources Compliance Form). The review time for this form can be a matter of seconds if the reviewer is intimately familiar with the area to the time it takes to complete a full field site visit if the area has never been disturbed. Over the last year, the Nation has also gone to great lengths to expedite the process by creating a department solely for handling telecommunications leases (General Land Development Department, or GLDD). To further expedite the process, a new electronic review system has been created whereby the companies can upload documents, where delivery is instantaneous and all reviewers receive the documents for review simultaneously, as opposed to hand delivering a paper packet down the entire chain of reviewers.

[46] See 25 C.F.R. §169.127; §169.204.

[47] 80 Fed. Reg. 72492, published November 18, 2015.

III. CONCLUSION

The Navajo Nation has a long history of encouraging telecommunications carriers to come onto its lands to deploy infrastructure, so long as such carriers respect the sovereignty and cultural rights of the Navajo people. The Nation stands ready to work with carriers to expedite, as much as possible, the ROW and leasing processes, given the somewhat awkward and cumbersome process imposed on the Nation by federal agencies beyond the FCC. Carriers cannot use the FCC to do an "end around" on other federal statutes, however, and the FCC should reject attempts to gut the Section 106 process in this proceeding.

THEREFORE, the Navajo Nation requests that the FCC properly consult with Tribes before proposing any changes to the Section 106 process, and ensure that those changes continue to recognize the sovereign rights of Tribes to protect their culturally sensitive locations.

Respectfully submitted,

THE NAVAJO NATION AND THE NAVAJO NATION TELECOMMUNICATIONS REGULATORY COMMISSION

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Dated: June 15, 2017

Attachment 1:
Map of Navajo Aboriginal Lands

[See Separate File Uploaded with Comments]